



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Buckeye Park Services, Inc.

File: B-282082

Date: June 1, 1999

Charles F. Merz, Esq., for the protester.

Capt. Sandra K. Whittington and John E. Lariccia, Esq., Department of the Air Force, for the agency.

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DIGEST

Exclusion of the protester's proposal from the competitive range was reasonable and consistent with solicitation that provided for a performance risk assessment of proposals, where record shows that, on prior contracts, agencies issued contract deficiency reports, made deductions for substandard performance, and reported problems with the firm's management of the contracts; the prior performance problems were brought to the protester's attention during discussions, although the protester failed to present an explanation that the agency found satisfactory.

DECISION

Buckeye Park Services, Inc. protests the award of a contract under request for proposals (RFP) No. F22600-99-R-0036, issued by the Department of the Air Force for ground maintenance at Keesler Air Force Base (AFB). Buckeye contends that the agency improperly evaluated its proposal.

We deny the protest.

On November 2, 1998, the agency issued the RFP for a fixed-price contract for an initial 6 ½-month contract, with four 1-year options. RFP at 2-16. The RFP required a contractor to provide all labor, materials, equipment, transportation, supervision, and other items and services necessary to perform grounds maintenance at Keesler in accordance with the performance work statement (PWS). RFP at 2, 5, 8, 11, 14.

The agency advised offerors that it intended to award a contract to the responsible offeror whose proposal was most advantageous to the Government, considering price and technical factors. RFP attach. 4, at 3. The RFP also provided for assessments of proposal risk and performance risk. The agency would first assess the risk associated

with each proposal (proposal risk) with regard to accomplishment of the RFP requirements. Evaluators would then consider performance risk, “by identifying and reviewing relevant present and past performance and making an overall risk assessment of the offeror’s ability to perform the proposed effort.” RFP attach. 4, at 4. This assessment would represent evaluators’ judgment of the probability of the offeror performing successfully, considering its demonstrated present and past performance. Evaluators would base their assessment of performance risk upon information submitted by offerors, regarding performance of comparable contracts in the prior 3 years. The agency cautioned offerors that the government would also use data obtained from other sources. Id.

The Air Force had received 15 proposals by December 3, the date set for receipt of initial proposals. Agency Report, Tab 12, Source Selection Authority’s Approval of and Contracting Officer’s Determination of Competitive Range, at 2nd - 3rd unnumbered pages. Buckeye’s received a low proposal risk assessment. Id. at 3rd unnumbered page.

With regard to the assessment of performance risk, evaluators ascertained that two of the protester’s five references fell outside the RFP’s 3-year timeframe, and that the references at Cherry Point Naval Air Station and Keesler provided negative performance assessments. Buckeye was assigned high performance risk. Agency Report, Tab 8, Evaluation of Buckeye Parks Services, Inc., at 3-4; Agency Report, Tab 9, Notice of Adverse Performance Assessment, at 1.

The agency notified Buckeye of the negative performance comments and requested that Buckeye respond to these comments. Buckeye responded by facsimile, with a memorandum dated January 17, generally challenging the negative assessments. Agency Report, Tab 10, Memorandum from Buckeye Park Services, Inc. to the Contracting Officer (Jan. 17, 1999). The agency discussed the evaluation and Buckeye’s response with the references, conducting a teleconference with personnel at Cherry Point on January 20. Contracting Officer’s Statement of Facts and Findings at 1. Cherry Point and Keesler confirmed their initial negative assessments. Agency Report, Tab 8, at 4-5. The agency’s reevaluation of Buckeye’s past performance, based on the additional information, did not result in any change in the original assessment of Buckeye as a high performance risk. Id. at 5.

There were three contracts at issue, the Cherry Point contract and two at Keesler for the same work as the instant solicitation.¹ The first Keesler contract had been

¹As noted above, Buckeye identified five contracts in its proposal, and two were outside the 3-year period. The agency did not give significant consideration to a listed contract at Homestead AFB, which was apparently performed by another firm, with Buckeye taking over at close out. Evaluators instead considered the 6-month period
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awarded to Hubbard Commercial Mowing, Inc. (HCM); the protester purchased HCM and performed the final 6 months of the contract. Agency Report, Tab 8 at 3-4; Agency Report, Tab 12 at 3rd unnumbered page. The protester then received a 3-month bridge contract to perform the services, pending award of the protested contract. Agency Report, Tab 12 at 3rd - 4th unnumbered pages. As noted above, all references were negative, even after consideration of the protester's January 17 response. On January 22, the contracting officer advised the source selection authority (SSA) of the evaluators' assessment that the past performance information resulted in a determination of high performance risk. Id. The contracting officer determined that there was significant doubt that Buckeye could or would perform, if awarded a contract. Id. at 4th unnumbered page. The SSA accepted the contracting officer's determination that Buckeye and nine other offerors had no reasonable chance for award and approved a competitive range consisting of the five remaining proposals. Id. at 1st unnumbered page. Buckeye requested and received a debriefing on February 17, and this protest followed.

Federal Acquisition Regulation (FAR) §§ 15.305(a) and 15.306(c) require agencies to evaluate proposals by assessing their relative qualities based solely on the factors and subfactors stated in the solicitation and, if discussions are to be conducted, establish a competitive range. Our Office does not independently reevaluate proposals but only reviews the agency's evaluation of proposals and determination to exclude a proposal from the competitive range for reasonableness and consistency with the criteria and language of the solicitation. SDS Petroleum Prods., Inc., B-280430, Sept. 1, 1998, 98-2 CPD ¶ 59 at 4; WP Photographic Servs., B-278897.4, May 12, 1998, 98-1 CPD ¶ 151 at 3. An agency may base its evaluation of past performance upon its reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency's interpretation of the facts. Quality Fabricators, Inc., B-271431, B-271431.3, June 25, 1996, 96-2 CPD ¶ 22 at 7. Buckeye presents nothing to show that the agency's evaluation of past performance and its consequent determination to exclude the protester from the competitive range was either unreasonable or inconsistent with solicitation criteria.

In its initial response to the Cherry Point report, Buckeye characterized the contract deficiency reports (CDR) as "minimal in nature." Agency Report, Tab 10 at 1. The protester generally attributed its performance problems to errors in government maps and contended that it had sufficiently responded to the CDRs by submitting a claim for equitable adjustment. Id. While admitting some errors in its maps, personnel at Cherry Point generally reported that these errors had nothing to do with the protester's failure to perform in accordance with the contract, or, in some cases, to

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where Buckeye took over services at Keesler from HCM, although the protester did not reference that contract in its proposal. Agency Report, Tab 8 at 3-4.

perform at all. Agency Report, Tab 11, Marine Corps Air Station Cherry Point Written Reply to Rebuttal. Cherry Point personnel characterized the protester's performance as the worst of any contractor in the installation's 25-year history, and attributed Buckeye's performance problems to Buckeye's lack of direct management attention and lack of project management at the installation. Agency Report, Tab 8 at 4. Cherry Point also noted the protester's failure to perform during the last 3 months of the contract. Keesler similarly confirmed its negative assessment. Id. at 4-5.

The record specifically shows that Cherry Point issued several CDRs, to which the protester did not respond: for raking clippings rather than dispersing them uniformly as required by contract; for failure to complete work on two runways, for waiting 3-4 days to trim after mowing (where the contract required the work be done concurrently); for failure to complete the semi-annual cut of the airfield (work still undone 6 weeks after the required completion date); and for safety violations. Buckeye admitted that it "did not respond to the CDRs but did however send a request for additional compensation." Agency Report, Tab 10 at 1. Cherry Point also pointed out that, regardless of the merits of the protester's claim for equitable adjustment, there was a lack of project management personnel on the installation to address the agency's concerns, and the protester had failed to perform at all during the last 3 months of the contract. Agency Report, Tab 8 at 4. Additionally, at Cherry Point, local law enforcement officials had seized some of the protester's grounds equipment because of late payments to subcontractors. Agency Report, Tab 8 at 3. In our view, consideration of the reported deficiencies and the overall negative assessment of Buckeye's performance at Cherry Point was proper, notwithstanding the protester's pending claim for additional compensation. See R.C.O. Reforesting, B-280774.2, Nov. 24, 1998, 98-2 CPD ¶ 119 at 2-3 (agency may base evaluation upon its own reasonable perception of inadequate past performance, notwithstanding the protester's pending appeal under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-13 (1994)).

While Buckeye argues that it was improper to consider this information without allowing it a chance to respond, the record contains both a memorandum in which the agency advises the protester of the negative assessment from Cherry Point and a memorandum from Buckeye responding to the assessment. We think Buckeye was given a reasonable opportunity to rebut the negative assessments but offered no persuasive evidence that Cherry Point's negative assessment was not supported.

The references at Keesler reported issuing CDRs during the 6 months where Buckeye succeeded HCM, as well as identifying unsatisfactory performance during the current, 3-month bridge contract. Agency Report, Tab 8 at 4. Keesler also reported that Buckeye's management was generally unavailable, making it difficult to achieve a timely resolution of problems. Id. at 3-4. In its response, Buckeye attributes problems under the initial, 6-month contract to having to address HCM's poor management and work ethic. Protester's Comments on Agency Report, Apr. 5, 1999, at 2. It attributes its problems on the 3-month bridge contract to the agency's

insistence on performance in accordance with requirements not enforced during the initial 6-month contract. Id. at 6-8. The protester attributed communication problems to poor telephone service at Keesler. Agency Report, Tab 10 at 2. Buckeye also explains that it was unable to perform certain work because it did not have the necessary license to spray herbicide and insecticide as required by the contract. Protester's Comments on Agency Report, Apr. 5, 1999, at 3. In general, Buckeye represents that its performance at Keesler was frustrated by the need to bring HCM personnel up to speed, and that the agency is unfairly insisting upon performance that it did not require of HCM (or of Buckeye under the 6-month contract). Id. at 2, 6-8. References at Keesler report issuing 22 CDRs and deducting \$26,100 for substandard performance. Agency Report, Tab 9 at 1. The record appears clear that, notwithstanding its criticism of HCM, Buckeye was reasonably viewed as responsible for the problems in its own performance of the contracts at Keesler, including admittedly not performing to contract requirements, lack of a license, and poor communications.

Although Buckeye provided some excuses for its poor performance at Cherry Point and Keesler, the record supports the agency's negative assessment of Buckeye's past performance and its conclusions that, because of Buckeye's contract management problems and failure to meet performance obligations, the protester should receive a high performance risk rating. Since we find no basis to question Buckeye's rating in this regard, we have no basis to conclude that the Air Force improperly excluded Buckeye's proposal from the competitive range.²

The protest is denied.

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²Buckeye has subsequently challenged the responsibility of the offerors remaining in the competitive range. The protester provides details on only one of these offerors. It contends that Metcalfe Grounds Maintenance, which is performing under a 3-month bridge contract pending the resolution of this protest, does not have the mandatory state licenses to apply herbicide and pesticide and does not have a licensed tree surgeon on its payroll. We previously addressed these identical contract requirements under a protest filed by Buckeye against the award to Metcalfe under the bridge contract. We concluded that these requirements are general performance requirements that the successful offeror may address after award. Buckeye Park Servs., Inc., B-282282, Apr. 27, 1999, 99-1 CPD ¶ __ at 2.